Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1687

PAUL TURNER

Petitioner

versus

DELTA STEAMSHIP LINES, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes Paul Turner and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the District Court's remittitur.

(a) OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit denying rehearing and affirming the Trial Court are attached as appendices to the petition for writ of certiorari filed by Delta Steamship Lines, Inc. The opinion of the Trial Court, the United States District Court for the Eastern District of Louisiana, also appears in an appendix to the petition. None of these decisions is officially reported.

(b) JURISDICTIONAL GROUNDS

(1) The opinion of the United States Court of Appeals

for the Fifth Circuit was rendered on February 4, 1977.

(2) The United States Court of Appeals for the Fifth Circuit denied the petitions for rehearing on March 2, 1977.

(3) The jurisdiction of this Court is invoked under 28 USC 1254 (1).

(c) QUESTIONS PRESENTED FOR REVIEW

(1) Whether the District Judge exceeded his authority and/or acted unreasonably in entering a remittitur of Seventy-Nine Thousand and No/100 ($79,000.00) Dollars of the jury award.

STATEMENT OF THE CASE

Paul Turner, cross appealed from the action of the District Court in entering a remittitur by reducing the jury awarded from $129,000.00 to $50,000.00. Acceptance of the remittitur was made "under protest". The District Court's reasons for new trial or remittitur can be found in appendix (A) of petitioner, Delta Steamship Lines' writ. Indeed, the "maximum recovery" rule of Gorsalitz and Glazer is the proper standard in determining the validity of a remittitur but the $129,000.00 verdict was well within the "maximum recovery" rule.

The evidence at the trial demonstrated the following facts:

1) Paul Turner was 45 years of age at the time he suffered injury and accordingly has a life expectancy of 27 years and a work life expextancy of 18 years. App. 47, 307.

2) Prior to the accident, Paul Turner did not have a hearing loss, nor did he have tinnitus, or ringing in the ears. App. 168.

3) Mr. Turner has sustained a severe high frequency hearing loss in both ears (testimony of Dr. Ilgenfritz and Dr. Wallace Rubin). App. 206, 293.

4) Mr. Turner, in fact, does have the ringing in the ears since this is an extremely common finding for people who have sustained a high frequency hearing loss. (Dr. Ilgenfritz and Rubin). App. 216, 294.

5) The fact that the ringing in the ears has remained for over three years, Doctors Ilgenfritz and Rubin testified, in their opinion, that it will be permanent. App. 220, 294.

6) There is absolutely no treatment or cure for the ringing in the ears. Mr. Turner will have to live with it, day and night, for the rest of his life. (Dr. Ilgenfritz and Dr. Rubin). App. 217, 294.

7) There is no cure for the hearing loss; no recovery of the hearing loss is possible (Dr. Ilgenfritz). App. 294, 295.

8) "With further noise exposure, the degree of involvement becomes much more accentuated, not only that the four thousand and six thousand cycles, but the hearing loss be-

gins to drop into the speech frequency, too, and the lower ranges, and the more critical areas as far as his ability to carry on a normal conversation and be able to hear conversation. But, the damage has been done in this case. You can prevent progression by avoiding further noise exposure. That is what I meant when I said he needs to protect himself in situations where there would be further exposure." (Dr. Ilgenfritz) App. 305.

9) He is susceptible to some day losing complete hearing (Dr. Ilgenfritz). App. 305.

10) The condition is progressive (Dr. Ilgenfritz). App. 305.

11) In his present work of a seaman, he has to wear ear protectors, and does, in fact, do so. App. 174, 305.

12) He had to wear ear protectors in any noisy area to safeguard his hearing from further loss. App. 174, 305.

13) The ringing in the ears will not "come and go" but, to the contrary, the condition will be with Mr. Turner whereever he goes, day and night, for the rest of his life. App. 220, 294.

Mr. Turner described the ringing in the ears as follows:

"Q Has it stopped for any period of time?

A It never stopped at any time when I am awake. I hear it when I am awake. I try sleeping. When I go to sleep, when I try to go to sleep when it is real quiet, quiet, like reading, anything, like that, anything, I hear it all the time.

Q Would you please describe what it sounds like, what it is like to you?

A Well, that would be like somebody with a real fine whistle or little ringing in there. It's a very hard thing to explain. If it's a loud explosion, you know, your ears ring after that, if somebody slaps you on the side of the head then you get a ringing then. But, with me, it's constant, it never stops.

Q Has there been a moment, ever been a moment since this time when this ringing has stopped?

A No. Only when I am asleep.

Q Do you know if it stops?

A Well, I don't know if it stops or not when I am sleeping.

Q But, you don't notice it?

A No.

Q Do you know of any moment when it actually stops?

A No.

Q Are there times when you notice it more than other times?

A Well yes, when it's real quiet. In a real quiet atmosphere or at home sitting around trying to read or antyhing. You know, getting ready to go to sleep or something like that. At night, when you get ready to go to sleep, I reach and I turn the radio on real low and that kind of takes it off my mind. I will be listening to the radio and it don't sound as loud. When I am reading or driving my car at night, or in the daytime, I mean, you hear it all the time, it's constant. App. 173, 174.

. . . .

Q I assume that it hasn't gotten any worse or better.

A Well it is there. I don't know whether it is better or worse, but it is still annoying.

ARGUMENT

Thus, Mr. Turner testified that this never ending ringing is annoying, aggravating and distracting to him. Tinnitus

can and often does cause grievous psychological problems, to many individuals suffering from this constant aggravation.

In *Marchese v. Monaco*, 52 N.J. Super. 474, 145 A. 2d 809 (1958), plaintiff's medical witness testified that plaintiff's tinnitus was "very disturbing." He expressed his opinion as to the effect of these noises in the ears on the patient's general well being, his nervous condition, as follows:

> "I know that it is very disturbing and many patients whom we have to treat for this distressing condition, many of them are almost deranged by the character of the noise. Some of them have even threatened suicide and things of that type in very severe forms, and it is a very disturbing and distressing symptom which we cannot help very often."

In *Marchant v. American Airlines*, 146 F.Supp. 612 (D. R.I. 1956), aff'd 249 F.2d 612 (1st Cir. 1957), the plaintiff's physician testified that the plaintiff's tinnitus could not be terminated; that the chances were "pretty great" that it would grow worse; and that when it gets to the point where it is so annoying that the patient is continually disturbed "we usually get rid of him and sent him to a psychiatrist to see if he can make the patient adjust himself to the difficulty."

Some men and women who suffer from tinnitus may "learn to live with it". Paul Turner has not learned to live with it and there is not one shred of evidence in this case from any medical witness that people learn to live with tinnitus, or that Paul Turner will learn to live with it.

The Trial Judge failed to give consideration to the fact that very grave psychological consequences can, and quite often do, develop and manifest themselves at any time within persons who suffer from this condition, and, most particularly, we are considering here, Mr. Paul Turner.

The jury's assessment of damages, fortified by the Seventh Amendment to the United States Constitution and by almost two hundred years of American legal tradition, cannot be lightly treated. These jurors had to ask themselves the question: "How has Mr. Turner reacted to this annoying condition"?

> These six jurors were fixed with the decision of having to determine, in terms of dollars and cents, the amount of money which would adequately compensate Paul Turner for his hearing loss, the ringing in his ears, his past lost earnings and his impaired earning capacity for the future.

LaRochefoucauld said long ago:

> "All of us are strong enough to put up with the misfortunes of other men".

We believe that the jury (selected by a random sampling of all citizens of this community) did in fact prove that they were able to understand the difficulties and the constant aggravation experienced by Paul Turner as a result of the ringing in his ears which he must live with day and night during all his waking hours, for the rest of his life.

Freedom from pain and suffering is one of the most valuable things in life and although it is hard to measure,

this does not mean it is not of great value. The jury had to determine what this injury meant to Paul Turner, not for a passing moment, an hour, a week or a year, but for the rest of his life.

As the law permits, counsel for plaintiff in opening statement and in closing argument suggested to the jury that damages for pain and suffering be calculated at the rate of one dollar ($1.00) per hour. To have given the plaintiff one dollar ($1.00) per hour, which we submit is not unreasonable, for his waking hours of sixteen (16) hours per day over his life expectancy of twenty-seven (27) years, the jury could have awarded the plaintiff ONE HUNDRED AND FIFTY-SEVEN THOUSAND, FOUR HUNDRED EIGHTY AND NO/100 ($157,480.00) DOLLARS. If the jury would have considered in their deliberation of damages, the figure of only fifty (50) cents an hour for sixteen (16) waking hours each day, for the rest of Mr. Turner's life, they would have arrived at a figure of SEVENTY EIGHT THOUSAND, SEVEN HUNDRED FORTY AND NO/100 ($78,740).00 DOLLARS for this permanent aggravation.

The District Judge recognized THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS for this element of damage as the maximum amount the jury could have awarded for this item of damage. App. 544. The District Judge concluded:

> "The jury also had to consider the severity of the pain and suffering and the facts and circumstances of this case do not warrant awarding the one dollar ($1.00) or even fifty (50) cents per hour. Both of these figures exceed the maximum of a reasonable range."

We respectfully submit the District Judge was in no better position, or, at least, it was not his prerogative to consider the severity of this pain. Even though the District Judge held that the per diem argument was valid in this case, his assessment of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS as the maximum for this item of damage would give the plaintiff something in the neighborhood of fifteen (.15c) cents per hour, which we respectfully submit is unreasonable.

With respect to past lost earnings at the time of trial, the evidence convincingly showed that plaintiff had past lost earnings of approximately SIX THOUSAND AND NO/100 ($6,000.00) DOLLARS. He remained not-fit for duty from August, 1972 until December, 1972. App. 172. His earning in 1970 were FOURTEEN THOUSAND, FIVE HUNDRED FOUR AND NO/100 ($14,504.00) DOLLARS; in 1971 his earnings were ELEVEN THOUSAND, SIX HUNDRED AND NO/100 ($11,600.00) DOLLARS, and in 1973 his earnings were SIXTEEN THOUSAND, SEVEN HUNDRED EIGHTY AND NO/100 ($16,780.00) DOLLARS. The Trial Judge did not even consider these past lost earnings in his reasons for new trial or remittitur.

With respect to the maximum amount the jury could have awarded for impaired earning capacity and impairment of ability to compete in the labor market, the Trial Judge reasoned: "In view of the evidence that ear protectors are needed to protect him from further hearing loss in a noisy environment, this item could have reasonably been considered by the jury as warranting a sizeable amount of recovery. Conceivably, circumstances in the future could require the plaintiff to compete in the labor market at a dis-

advantage upon divulging that he has to wear ear protectors in noisy environment, and upon testing that would reveal his loss of hearing in the high frequency speech ranges. Giving consideration to the plaintiff's work life expectancy of 18 years, a reasonable range for this item is $1,000.00 to $10,000.00." App. 545, 546.

Recognizing that the plaintiff's earnings, at the time of trial, were $16,000.00 and further recognizing that the jury was authorized to make an award for impairment of earning capacity, the assigning of $10,000.00 as the maximum amount the jury could have given for this item of damage gives Mr. Turner a maximum amount of FIVE HUNDRED, FIFTY-FIVE AND NO/100 ($555.00) DOLLARS per year over the next eighteen (18) years. We respectfully submit that this is not fair to Mr. Turner.

With respect to loss of earning capacity, the jury could have carefully considered the likelihood that Paul Turner's future earning capacity is truly diminished as a result of the condition of tinnitus and the hearing loss. Paul has worked as a seaman for almost thirty (30) years, including two (2) years in the United States Navy. He knows no other profession. He has only a ninth grade education. His skills are those of an able-bodied seaman and those of a bosun. He has no other skills as a worker.

Should Paul Turner's condition require him to stop sailing, or in his exercise of freedom of choice, he chooses to do so, he is, if only because of his age, forty-seven (47) at best not very employable, and the necessity of his wearing ear protectors, at all times when he is around a noisy environment for measurable periods, acts as a visible handicap, a "coup de grace", as it were, to his chances of getting

a job unreleated to that of a seaman.

In the consideration of loss of earnings, the jury could have considered the following matters:

1) The evidence showed Paul Turner had past lost earnings, at the time of trial, of $6,000.00;

2) The jury could have determined that as a result of his injury and disability, he is now an increased industrial risk and industry is not as apt to desire his services as previous to the injury;

3) Paul Turner had a right to remain a seaman and his injury and resultant disability could force an early retirement which would result in a substantial loss of earnings, since he was earning $16,000.00 per year at the time of trial;

4) He is limited to the job he now holds. He knows he can't leave his work as that of a seaman because he knows he will have trouble obtaining employment elsewhere. His ability to earn a living in various other jobs has been severely impeded;

5) In any other job around noise, Paul Turner would have to use ear protectors, which is a visible handicap, which may prevent him from remaining employable in those circumstances;

6) If he has to complete job application forms requesting information pertaining to previous injuries, or diabilities, he would have to provide information relating to the necessity to wear ear protectors and the ringing in the ears sensation which he experiences;

7) If medical examinations are required for future employment, he may not be able to pass these examinations, especially, if hearing tests are performed.

If Mr. Turner's earnings were reduced to $10,000.00 per year, over the next eighteen (18) years of his work life expectancy, he would suffer loss of earnings of $6,000.00 per year. Over eighteen (18) years, this yearly loss would amount to ONE HUNDRED AND EIGHT THOUSAND AND NO/100 ($108,000.00) DOLLARS. Discounting these earnings, at four and one-half (4-1/2%) percent interest over the next eighteen (18) years, the loss of future earnings would be SEVENTY-TWO THOUSAND NINE HUNDRED AND SIXTY AND NO/100 ($72,960.00) DOLLARS.

The fixing of damages is an integral part of the jury's function. It is respectfully submitted that the jury in this case resolved any conflicts in the evidence in favor of the plaintiff, Paul Turner, in making its award of damages and considering the evidence in the light most favorable to the plaintiff and with all reasonable inferences deduced therefrom, there is substantial evidence in the record to support the jury's verdict.

Jury verdicts are not to be regarded lightly and should not be disturbed "unless the jury's award of damages is

contrary to all reason * * * or is so excessive as to shock the conscience of the Court."
Tucker v. Bethlehem Steel Corporation, 445 F.2d 390 (5th Cir. 1971).

CONCLUSION

In conclusion, plaintiff respectfully submits that there is substantial evidence in the record to support the jury's award of damages. The verdict was well within the maximum amount the jury might reasonably have awarded. In ruling on the granting of the remittitur, all reasonable inferences should be decided in favor of the plaintiff. The jury had a permanent injury to consider and was able to consider this permanent injury for the duration of plaintiff's life expectancy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari has been mailed to G. Edward Merritt, 2141 International Trade Mart, New Orleans, Louisiana, 70130, this 27th day of May, 1977.

Steven R. Plotkin